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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1123

JOHN M. HARTZBERG and LOUIS HARTZBERG, co-partners doing business under the firm name and style of J. & L. HARTZBERG,

Petitioners,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S OPPOSING BRIEF

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Official Report of Opinion Below

The opinion of the Supreme Court of the State of New York, County of New York, appears at R. 31 and is reported in 181 Misc. 129. Both the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, and the Court of Appeals of the State of New York unanimously affirmed, without opinion (R. 387-9; 268 App. Div. 904; 268 App. Div. 978; R. 391, 294 N. Y. 641, Remittitur R. 394, 295 N. Y. 703).

Statement of the Case

On June 17, 1941, at about 7:00 p. m., a trunk, owned by the petitioners (R. 53), was stolen from the baggage room of respondent's railroad station at Detroit, Mich. (R. 236). It contained, in addition to certain men's cloth-

ing, sample jewelry alleged to be worth $250,000 (R. 8), reduced at the trial to a stipulated market value of $169,078.47 (R. 163). The trunk was delivered to respondent at the instance of Theodore H. Brodie (R. 69), a traveling salesman for (R. 47), and a partner of, the petitioners (R. 107).

Brodie, in the latter part of April, 1941, made an extensive trip from New York to California (R. 48), selling and taking orders for the jewelry contained in the trunk (R. 86). Upon his return in the early part of June, one of the other partners, John M. Hartzberg, continued the selling trip to Boston and then to Philadelphia (R. 84), where he turned the trunk over to Brodie who continued the selling trip to Baltimore, Md., thence to Pittsburgh, Pa., and thence to Detroit, Mich. (R. 48), where he remained for four days. From Detroit, Brodie intended to go to Cleveland, Ohio, and then to Buffalo and finally back to New York City (R. 94).

On each leg of the selling trip, until it was interrupted at Detroit, the trunk was checked as passenger baggage either by Brodie or Hartzberg, at a declared value of $100 (R. 89, 91-2, 104, 123), and Brodie admitted that it was his intention to declare a value of $100 on the trunk when he moved from Detroit to Cleveland (R. 273). Such a declaration permits a passenger to have carried, under the filed tariffs and without additional cost, 150 pounds of baggage between the points called for on his ticket (R. 369-70). The trunk was fully insured and the petitioners were subsequently reimbursed in full by their insurance company (R. 81).

Brodie, on June 17, 1941, as was his usual practice (R. 97), engaged space on a train leaving Detroit at 12:15 a. m., June 18th, through the facilities of the Statler Hotel (R. 98-9, 313, 315, 317-18), of which he was a guest, and then proceeded to have the trunk delivered to the railroad station through the same facilities (R. 68). He then

checked out of the hotel and with one of his customers proceeded to the hotel's dining room (R. 99). It was Brodie's intention to present himself at the baggage room before train time and check his trunk upon his passenger ticket and make the usual declaration of $100 value (R. 273).

Pursuant to Brodie's request, the trunk was delivered to the station at 6:20 p. m. (R. 301). Upon the arrival of the trunk at the station a receipt was issued therefor (Petitioners' Exhibit 14, R. 338) and delivered to Brodie's agent (R. 206). Brodie does not even claim that he issued instructions that the drayman should declare any excess value. The receipt bore the notation that "Baggage liability is limited in accordance with tariff regulations. Excess valuation will be subject to charge of 10 cents for each $100." All reference to this notation is omitted from petitioners' recital of the contents of the receipt (Petition, p. 4). Neither the driver delivering the trunk nor respondent's agent receiving it knew what it contained (R. 292, 207). It was receipted for and handled by respondent's employees as any ordinary trunk moving as baggage on a passenger ticket. Daily through this station over 1,000 pieces of baggage are handled in the same manner (R. 258). Within a moment or two after the receipt of Brodie's trunk (R. 213), another trunk was similarly received and placed beside it (R. 215).

Shortly thereafter, one of respondent's employees, hearing a noise, which he described as though made by the closing of a trunk on the back of an automobile (R. 237), came out of his office and saw a car disappearing with a trunk "sticking out" the rear. Upon investigating, he observed that one of the two trunks which he had seen only five minutes before standing together near the scale, had disappeared (R. 236). Knowing only that the trunk had come from the Statler Hotel (R. 239), it took some five or ten minutes to call the hotel and ascertain the name of the owner. At the hotel, Brodie was paged (R. 100) and finally arrived at the station (R. 102).

Although many investigations have been conducted by private, as well as public police, no trace has ever been found of the missing trunk or its contents.

The pertinent portions of the baggage rules, regulations, rates and charges are set forth in Respondent's Exhibit D (R. 364-373).

Petitioners contended that the liability of the respondent was governed by the prevailing Michigan law with respect to bailment, maintaining that the respondent was liable as a bailee from the time of the delivery of the trunk to it until the owner actually "checked" such trunk on his passenger ticket, or otherwise gave instructions concerning its handling, regardless of its value, and despite the owner's acceptance of a receipt that the trunk was subject to tariff regulations with limited liability. The petitioners maintained that mere delivery of a trunk under such circumstances permitted the owner, subsequent to the delivery, to elect to hold the carrier either as a warehouseman, an intrastate, or an interstate, carrier.

Respondent contended that its liability is that of an interstate carrier, in that the trunk was delivered as baggage for transportation in interstate commerce under the published tariffs of the respondent; that the tariffs are lawful and were properly applied by the courts below.

ARGUMENT

I

The petition shows no special or important reason why the writ should issue.

1. The four subdivisions under point "1", set forth on page 8 of the petition as "Reasons Relied on for the Allowance of the Writ" raise no federal question not heretofore determined by this Court.

Subdivisions "(a)" and "(b)" of that point assume a state of facts not in accord with the evidence. Petitioners

refer to delivery of the trunk for "local storage bailment" or "local storage". This was not Brodie's intention. The court found that:

> "In actuality plaintiffs' trunk was delivered to defendant's baggage room for transportation in interstate commerce from Detroit, Michigan, to Cleveland, Ohio, as baggage upon a passenger ticket which had been reserved for plaintiffs' salesman" (R. 36).

Not only was the truth of this finding undisputed on the trial, but the unanimous affirmance in the two appellate courts of New York would appear to preclude the petitioners from questioning it here. Consequently, any claim that the transaction should be governed by local law may be laid aside.

Subdivisions "(c)" and "(d)", in addition to assuming a state of facts contrary to the evidence, raise questions disposed of by this Court in *Boston & Maine R. R. Co.* v. *Hooker,* 233 U. S. 97 and *Galveston &c. Ry. Co.* v. *Woodbury,* 254 U. S. 357.

There is an element of inconsistent opportunism in the petitioners' petition. The federal question relied on as the basis for this Court's acceptance of jurisdiction is in the Interstate Commerce Act. If, however, jurisdiction is taken by this Court, and the petitioners shall have thus succeeded in crossing the threshold, then, as appears from their petition here and below, the petitioners will invoke the state law of Michigan.

2. Although the petition, points "2" and "3" (page 8), states that the State court has decided federal "questions in a way probably not in accord with applicable decisions of this Court" and "erroneously interpreted and applied the decisions" in the *Hooker* and *Woodbury,* cases, *supra,* no federal case in conflict with the State court's opinion is referred to in the petition. The *Hooker* and *Woodbury* cases were properly applied to the case at bar, as demonstrated later herein.

3. This case does not present federal questions of vital importance as claimed in the petition, point "4" (p. 12). While the record indicates, as stated in the petition, that over 30,000 pieces of baggage were handled at the Detroit station during the month of June, 1941, and that about one-half of 1% were held in the baggage room for 24 hours (R. 258), this in no way demonstrates any misunderstanding or misinterpretation of the tariffs, rules or regulations by the general public or the railroads. All the decision means is that the 7,000 jewelry salesmen who travel on the railroads must declare the excess value of their sample trunks just like other patrons and that no opportunity will be afforded them to claim, after loss occurs, that a trunk delivered for interstate transportation was in "local storage" when lost.

II

The issues in this case were decided by the lower Courts upon well recognized and established precedents of this Court.

The Trial Court found that the delivery of the trunk to the respondent was an incident to transportation in interstate commerce and liability for the loss must be resolved by the provisions of the Interstate Commerce Act, the carrier's tariffs and rules filed pursuant thereto and the decisions interpreting and applying the same (R. 36).

This Court has held that where the character of the commerce—interstate or intrastate—is in issue, the intention of the shipper is an element, superior even to the actual contract made with the carrier, in determining the essential character of the commerce. (*B. & O. S. W. R. R. Co.* v. *Settle,* 260 U. S. 166, 171; *Atlantic Coast Line R. R. Co.* v. *Standard Oil Co.,* 257 U. S. 257, 268.) The courts look to the intention of the parties at the time of the delivery of goods to determine the rights and obligations

between them (*Blossom* v. *Griffin*, 13 N. Y. 569, 572; *Ladue* v. *Griffith*, 25 N. Y. 364, 367; *Wade* v. *Wheeler*, 3 Lansing 201, 204, aff'd. 47 N. Y. 658; *Coyle* v. *Western R. R. Corp.*, 47 Barb. 152, 153). Where goods are delivered under circumstances indicating that they are to be carried, it is presumed that they are received by the carrier, as such, and not as a warehouseman (*Rogers* v. *Wheeler*, 52 N. Y. 262, 266; *Witbeck* v. *Holland*, 45 N. Y. 13). If there is any dispute as to whether the goods were delivered for carriage or storage, such dispute is for the fact finding tribunal (*Judson* v. *Western R. R. Corp.*, 4 Allen 520, 525, 527).

Interstate "transportation begins * * * when the merchandise has been placed in the possession of a carrier." (*Penna. R. R. Co.* v. *Pub. Utilities Com. of Ohio*, 298 U. S. 170, 175.) Transportation in interstate commerce is governed by federal law, *i. e.*, the Interstate Commerce Act. "Transportation" as the word is used in the Act, is defined as including "all services in connection with the receipt, delivery, * * * storage, and handling of property transported" (49 U. S. C. Sec. 1 (3)). This definition in and of itself indicates that interstate transportation of property includes every phase reasonably connected with such transportation of property, from the time of its initial delivery to the carrier, to its final redelivery to the passenger.

The Act provides that no carrier shall engage in the transportation of passengers or property "unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published" and that no carrier shall "extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs" (49 U. S. C. Sec. 6 (7)).

The respondent filed its tariff schedules and duly published the same (R. 364-373).

"The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, bind-

ing as such upon Railroad and shipper alike." (*Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 197.) To the same effect:

Lowden, et al., Trustees v. *Simonds-Shields Lansdale Grain Co.*, 306 U. S. 516;
Louisville & Nashville R. R. Co. v. *Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217, 234;
Keogh v. *Chicago, Northwestern Rwy. Co.*, 260 U. S. 156;
Geo. Fla. & Ala. Ry. v. *Blish Co.*, 241 U. S. 190, 197;
Southern Ry. Co. v. *Prescott*, 240 U. S. 632, 638;
C. C. C. & St. L. Ry. Co. v. *Dettlebach*, 239 U. S. 588;
Louisville & Nashville R. R. Co. v. *Maxwell*, 237 U. S. 94;
Great Northern Rwy. Co. v. *O'Connor*, 232 U. S. 508.

The Second Cummins Amendment to the Interstate Commerce Act expressly exempts baggage from the provisions of the Act respecting a carrier's liability for full actual loss (49 U. S. C. Sec. 20 (11); *Culbreth* v. *Martin, et al.*, 179 N. C. 678, 103 S. E. 374).

The cases of *Boston & Maine R. R. Co.* v. *Hooker*, 233 U. S. 97 and *Galveston &c. Ry. Co.* v. *Woodbury*, 254 U. S. 357, have determined all questions raised by the petitioner. In the *Hooker* case this Court decided in favor of the carrier the question of the legality of baggage tariffs limiting liability to a specified amount, unless a higher value was declared and charges paid therefor at the time of delivery, in connection with the transportation of baggage on a passenger ticket from Boston, Mass. to Sunapee Lake Station, N. H. It was held that the shipment, being in interstate commerce, was controlled by the provisions of the Interstate Commerce Act, and the amendments thereto; that a carrier could limit its common law liability in the transportation of baggage by the filing of rules so prescribing;

that both the passenger and the carrier must take notice of such rules from and after the date of their filing; that knowledge of the passenger that the rate is based on value is to be presumed from the schedules filed with the Commission; that such rules are binding on passenger and carrier, even though the passenger had no knowledge thereof, and even though the carrier made no inquiry as to the value although the outward appearance of the baggage indicated a greater value; that service performed contrary to the rules was absolutely prohibited as discriminatory and unlawful; that regardless of the negligence of the carrier, such rules were, nevertheless, applicable and binding; that a carrier's rule limiting its liability to $100 unless a higher value is declared and charges paid therefor at the time of delivery, was lawful and just; that as no value was declared, the passenger was limited to the amount specified in the rule; and the reasonableness of the charges specified in the tariffs could only be attacked before the Commission.

In the *Woodbury* case, this Court cited the *Hooker* case, *supra,* and found that the Cummins Amendment (Act of March 4, 1915, c. 176, 38 Stat. 1196, as amended by the Act of August 9, 1916, c. 301, 39 Stat. 441, now embodied in 49 U. S. C. sec. 20 (11)) enacted subsequent to the *Hooker* decision did not, in anywise, alter the rule for liability for baggage and limited a plaintiff to a $100 recovery in the absence of a declaration of a higher value and payment of excess charge.

While a limitation as to value does not release a carrier from negligence, its liability in such case will not extend beyond the limited value (*Hart* v. *Penn. R. R. Co.*, 112 U. S. 331).

Even if Brodie had dissented from the limitation of liability in respect to the baggage delivered by him to the respondent, it would have been immaterial, since, by his purchase of a ticket for transportation in interstate commerce and his delivery of the baggage to the respondent with or without "checking", the rights of the parties became fixed by law which imposed upon each of them

the terms and conditions of the contract and could not be set aside unless changed, not by the courts, but by the Interstate Commerce Commission. As was said by Mr. Justice Brandeis in *Western Union Tel. Co.* v. *Esteve Bros. & Co.*, 256 U. S. 566, at page 572:

> "Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not as before a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed. Assent to the terms of the rate was rendered immaterial, because when the rate is used, dissent is without effect. This principle was established in cases involving the limitation upon a carrier's liability for baggage by *Boston & Maine Railroad* v. *Hooker*, 233 U. S. 97, and *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Woodbury*, 254 U. S. 357."

Quite aside from the obvious propriety of the maximum limitation of the $2,500 valuation for a passenger's baggage (transportation by express being available) the fact remains that any suggestion of invalidity in such limitation is immaterial in this case. A similar argument was advanced in the *Western Union* case, *supra*, but was disposed of in that case as not raised by the facts before the court. The same is true in this case. Brodie admitted it was his intention to check the trunk to Cleveland upon his passenger ticket and make the usual declaration of $100 value (R. 273).

CONCLUSION

The application for a writ of certiorari should be denied.

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Attorney for Respondent.

C. AUSTIN WHITE,
of Counsel.

May 7, 1946.